

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUAN ALVAREZ BAEZ,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. 2:16-CV-00539-DWC

**ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS**

Plaintiff Juan Alvarez Baez filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant’s denial of Plaintiff’s application for supplemental security income (“SSI”). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. See Dkt. 7.

After considering the record, the Court concludes the Administrative Law Judge (“ALJ”) erred when she evaluated the medical evidence, in formulating the residual functional capacity (“RFC”) and finding Plaintiff capable of performing past relevant work. The ALJ’s error is therefore harmful, and this matter is reversed and remanded pursuant to sentence four of 42

1 U.S.C. § 405(g) to the Acting Commissioner of Social Security (“Commissioner”) for further
 2 proceedings consistent with this Order.

3 FACTUAL AND PROCEDURAL HISTORY

4 On September 20, 2011, Plaintiff filed an application for disability insurance benefits
 5 (“DIB”), and on October 25, 2011, Plaintiff filed an application for SSI, alleging disability as of
 6 July 15, 2007 in both applications. *See* Dkt. 12, Administrative Record (“AR”) 20. The
 7 applications were denied upon initial administrative review and on reconsideration. *See* AR 20.
 8 A hearing was held before Administrative Law Judge (“ALJ”) Ruperta M. Alexis on January 30,
 9 2013. *See* AR 20, 137. At the hearing, Plaintiff amended the alleged onset date to October 25,
 10 2011, making Plaintiff ineligible for DIB. *See id.* In a decision dated June 27, 2013, the ALJ
 11 determined Plaintiff to be not disabled and denied Plaintiff’s request for SSI. AR 20, 137-47.

12 Plaintiff’s request for review of the ALJ’s decision was accepted, and the Appeals
 13 Council remanded the matter back to the ALJ to more fully develop the record. AR 20, 21, 156-
 14 62. Following remand, Plaintiff reappeared at a second hearing on January 9, 2014, before the
 15 same ALJ, as did an impartial vocational expert (“VE”), Olof R. Elofson. AR 20. Plaintiff
 16 testified through an interpreter. AR 20. In a decision dated April 25, 2014, the ALJ again
 17 determined Plaintiff to be not disabled. AR 20-35. Plaintiff’s second request for review was
 18 denied by the Appeals Council, making the ALJ’s second decision the final decision of the
 19 Commissioner. *See* AR 1; 20 C.F.R. § 404.981, § 416.1481.

20 In Plaintiff’s Opening Brief, Plaintiff maintains the ALJ erred by: (1) improperly finding
 21 Plaintiff capable of performing jobs the VE testified Plaintiff could not perform, and which
 22 Plaintiff maintains does not constitute past relevant work; (2) failing to find Plaintiff disabled

23

24

1 under GRID Rule 203.01; and (3) improperly discounting the medical evidence and thus
2 formulating an erroneous residual functional capacity (“RFC”). Dkt. 14, p. 1.

3 STANDARD OF REVIEW

4 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
5 social security benefits if the ALJ’s findings are based on legal error or not supported by
6 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
7 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

8 DISCUSSION

9 **I. Whether the ALJ Erred in Formulating the RFC.**

10 Plaintiff asserts the ALJ formulated an erroneous RFC by (1) improperly omitting
11 portions of Margaret Dolan, Ph.D.’s medical opinion; (2) improperly relying upon the non-
12 examining opinion of Alex Fisher, Ph.D. over the opinion of Dr. Dolan; and (3) making
13 contradictory findings regarding Plaintiff’s limited English proficiency and requiring him to take
14 direction from supervisors. Dkt. 14, pp. 9-13.

15 A. Whether the ALJ Properly Evaluated the Medical Evidence.

16 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
17 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
18 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d
19 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the
20 opinion can be rejected “for specific and legitimate reasons that are supported by substantial
21 evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035,
22 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can
23 accomplish this by “setting out a detailed and thorough summary of the facts and conflicting
24

1 clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
 2 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

3 i. *Margaret Dolan, Ph.D.*

4 Although the ALJ gave Dr. Dolan’s opinion great weight, Plaintiff argues the ALJ failed
 5 to incorporate all of Dr. Dolan’s opined limitations, namely Dr. Dolan’s opinion “that successful
 6 work activity required additional treatment, a lack of PTSD ‘triggers,’ structure and support.”
 7 Dkr. 14, p. 10. Margaret Dolan, Ph.D. evaluated Plaintiff on April 23, 2012, with the assistance
 8 of an interpreter. AR 473-80. She charted Plaintiff’s self-reports of being “traumatized by seeing
 9 people dead and in ghoulish conditions (without heads, dismembered)” while fighting in Angola
 10 for Cuba and being placed in a military prison when he refused to return to Angola. AR 473. Dr.
 11 Dolan reviewed several medical records for her psychological assessment. AR 474. In addition,
 12 she conducted a mental status examination. AR 475. She diagnosed Plaintiff with Post Traumatic
 13 Stress Disorder (“PTSD”) and observed he “has recurrent nightmares, is constantly vigilant, has
 14 startle reactions to noise and lights [and] is becoming increasingly avoidant and withdrawn
 15 with anxiety and depressive symptoms.” AR 478. Dr. Dolan opined Plaintiff’s PTSD “should not
 16 preclude his working.” AR 479.

17 However, as to functional limitations, Dr. Dolan opined Plaintiff would need treatment
 18 and assistance before engaging in work. AR 479-80. She noted Plaintiff’s ability to reason was
 19 good and his memory problems may be situational and “should not be a problem in a job
 20 situation.” AR 479-80. With respect to sustained concentration and persistence, Dr. Dolan opined
 21 Plaintiff has deteriorated, but attributed the deterioration to Plaintiff’s unstable living situation.
 22 AR 480. She observed concentration and persistence “might improve when his situation is stable
 23 and his medication titrated. At that point, they may not interfere with a simple supervised work
 24

1 situation.” AR 480. With respect to social interaction, the ALJ noted Plaintiff would need to be
 2 in a job with no “triggers to his PTSD” such as loud noises and noted Plaintiff “might have a
 3 problem working with black individuals.” AR 480. Finally, as to adaptation, the Dr. Dolan
 4 opined Plaintiff “might do reasonably well” adapting “[i]f he is able to stabilize on medication,
 5 and avoid substances, combined with stable housing and employment.” AR 480.

6 The ALJ gave Dr. Dolan’s opinion “great weight” and observed:

7 [Dr. Dolan] opined that with the appropriate structure, the claimant could manage
 8 unskilled work and regular work hours. She notes that the claimant’s ability to
 9 reason is relatively good, and points out that he did well with abstractions despite
 10 not being a native English speaker. Dr. Dolan went on to opine that while the
 11 claimant has some difficulty with sustained concentration, his problems are not so
 12 severe as to interfere with the ability to perform simple work. Finally, Dr. Dolan
 13 opined that the claimant is pleasant, appropriate, and likeable, and could generally
 14 behave appropriately in the workplace.

15 AR 31 (citations omitted). The ALJ found Dr. Dolan’s opinion consistent with the longitudinal
 16 treatment record and supported by Plaintiff’s previous work history in spite of his mental
 17 impairments. AR 31.

18 An ALJ “need not discuss all evidence presented.” *Vincent ex rel. Vincent v. Heckler*, 739
 19 F.3d 1393, 1394-95 (9th Cir. 1984). However, the ALJ “may not reject ‘significant probative
 20 evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting
 21 *Vincent*, 739 F.2d at 1395). The “ALJ’s written decision must state reasons for disregarding
 22 [such] evidence.” *Flores*, 49 F.3d at 571. In her decision, the ALJ did not discuss Dr. Dolan’s
 23 opinions regarding Plaintiff’s functional limitations in the absence of a more stable living
 24 situation and medication management. See AR 31, 26. Dr. Dolan qualified her assessment
 Plaintiff could work and opined he could work when his “situation improved.” AR 480. She also
 opined he was facing situational stressors causing functional limitations related to his sustained
 concentration and persistence. See AR 480. The ALJ did not address Dr. Dolan’s assessed

1 functional limitations regarding Plaintiff's concentration and persistence. Thus, the Court cannot
 2 determine if the ALJ properly considered this limitation or simply ignored the evidence.

3 Further, Dr. Dolan stated Plaintiff would do well with social interaction in a job "if he did
 4 not feel frightened or have triggers to his PTSD about (Loud noises, etc.). Without any context,
 5 Dr. Dolan stated Plaintiff "might have a problem working with black individuals." AR 480.
 6 Again, the ALJ did not discuss these additional functional limitations related to Plaintiff's PTSD
 7 assessed by Dr. Dolan. *See AR 31.* Without an adequate explanation, the Court cannot determine
 8 if the ALJ properly considered all the limitations included in Dr. Dolan's opinion. Accordingly,
 9 the ALJ erred. *See Flores*, 49 F.3d at 571 (an "ALJ's written decision must state reasons for
 10 disregarding significant, probative evidence"); *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir.
 11 2003) ("We require the ALJ to build an accurate and logical bridge from the evidence to her
 12 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate
 13 findings.").

14 "[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674
 15 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
 16 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*
 17 *Comm'r, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at
 18 1115. The determination as to whether an error is harmless requires a "case-specific application
 19 of judgment" by the reviewing court, based on an examination of the record made "'without
 20 regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at 1118-
 21 1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

22 Had the ALJ more fully developed the record as to Dr. Dolan's opined limitations
 23 regarding Plaintiff's impairments and functional limitations, she may have included additional
 24

1 limitations in the RFC and in the hypothetical questions posed to the vocational expert. AR 26,
 2 93-100. For example, the ALJ may have included additional limitations in the RFC related to
 3 triggers for Plaintiff's PTSD. As the ultimate disability determination may have changed, the
 4 ALJ's error is not harmless and requires reversal. *Molina*, 674 F.3d at 1115.

5 ii. *Alex Fisher, Ph.D.*

6 Alex Fisher, Ph.D. was a non-examining State agency psychological consultant. AR 112-
 7 20. He relied, in part, on Dr. Dolan's medical opinion in assessing Plaintiff's functional
 8 limitations. *See id.* The ALJ gave Dr. Fisher's opinion "great weight", including his opinion "that
 9 the claimant has mild limitation[s] in activities of daily living, and moderate limitation[s] in
 10 social functioning and concentration, persistence, and pace." AR 31. The ALJ found Dr. Fisher's
 11 opinion consistent with the longitudinal treatment history as well as consistent "with the
 12 claimant's ability to follow simple instructions as evidenced throughout the medical records."
 13 AR 31. However, because the Court has found the ALJ erred in evaluating Dr. Dolan's opinion,
 14 upon which Dr. Fisher relied in formulating his medical opinion, the ALJ should reevaluate the
 15 medical opinion evidence, including the opinion of Dr. Fisher, upon remand. *See* 20 C.F.R. §§
 16 404.1527, 416.927.

17 B. Whether the ALJ Made Contradictory Findings Regarding Plaintiff's Language
Skills in the RFC.

18 Plaintiff also argues the ALJ made contradictory findings in the RFC regarding Plaintiff's
 19 language skills and ability to communicate in English. Dkt. 14, pp. 9-10. If a disability
 20 determination "cannot be made on the basis of medical factors alone at step three of the
 21 evaluation process," the ALJ must identify the claimant's "functional limitations and
 22 restrictions" and assess his or her "remaining capacities for work-related activities." SSR 96-8p,
 23 1996 WL 374184 *2. A claimant's RFC assessment is used at Step Four to determine whether he
 24

1 or she can do his or her past relevant work, and at Step Five to determine whether he or she can
 2 do other work. *Id.* A claimant's residual functional capacity is the maximum amount of work the
 3 claimant is able to perform based on all of the relevant evidence in the record. *Id.*

4 In the RFC, the ALJ determined Plaintiff "is limited to tasks that would not require
 5 communication in English" but also determined Plaintiff "can interact with supervisors and can
 6 take instructions and direction." AR 26. In her findings regarding Plaintiff's English capabilities,
 7 the ALJ noted "[a]t the hearing, the claimant reported that he did not speak or understand
 8 English. Notably, throughout many of the medical records, the claimant is able to complete the
 9 appointments in English, without the use of an interpreter." AR 27 (without citation to the
 10 record). She also observed "[t]he claimant was able to interpret abstract proverbs in English,
 11 despite the fact that it was not his native language." AR 29. Finally, and again without citation to
 12 the record, the ALJ noted "the claimant is able to communicate in English both with and without
 13 the assistance of an interpreter" and observed she "accommodated for the claimant's education
 14 level and English capabilities through" the jobs finding Plaintiff capable of performing past
 15 relevant work. AR 33.

16 First, in determining limitations related to Plaintiff's English skills in the RFC, the ALJ
 17 relied upon Dr. Dolan's psychological assessment to note Plaintiff was able to interpret
 18 abstractions "despite not being a native English speaker." See AR 31; *see also* AR 29 ("The
 19 claimant was able to interpret abstract proverbs in English, despite the fact that it was not his
 20 native language.") (citing Dr. Dolan's examination at 477), AR 32 (noting "during a subsequent
 21 evaluation, the claimant was able to abstract proverbs correctly without difficulty."). However,
 22 the Court notes Dr. Dolan conducted her examination with the assistance of a translator. *See* AR
 23 473. Thus, to the extent the ALJ relied upon Dr. Dolan's examination to suggest Plaintiff speaks
 24

1 English , the ALJ erred because her assessment is inconsistent with the evidence of record given
 2 Plaintiff relied upon a translator to communicate with Dr. Dolan. *See AR 473.*

3 Second, the RFC included a limitation to “tasks that would not require communication in
 4 English” but also provides Plaintiff “can interact with supervisors and can take instructions and
 5 direction.” AR 26. Although the ALJ noted Plaintiff was able to speak English at some
 6 appointments, she did not make any findings regarding Plaintiff’s language skills and his ability
 7 to take instruction from supervisors. *See AR 26.* Thus, the ALJ’s RFC is internally inconsistent.
 8 *See Perez v. Astrue*, 250 F. App’x 774, 776 (9th Cir. 2007) (noting the ALJ’s RFC was error
 9 because it was internally inconsistent and not supported by substantial evidence) (citing *Batson*,
 10 359 F.3d at 1193). As this matter is already remanded to reevaluate the medical evidence, upon
 11 remand, if necessary, the ALJ shall also resolve the inconsistency between her determination
 12 Plaintiff cannot communicate in English but can interact with and take direction and instructions
 13 from supervisors.

14 **II. Whether the ALJ Improperly Found Plaintiff Capable of Performing Past
 15 Relevant Work or Whether the ALJ Should Have Found Plaintiff Disabled
 16 at Step Five.**

17 Plaintiff also maintains the ALJ erred in finding him capable of performing past relevant
 18 work at Step Four because Plaintiff cannot read or speak English.¹ Dkt. 14, pp. 4-7. Plaintiff also
 19 argues the ALJ should have proceeded to Step Five and found him disabled pursuant to GRID
 20 203.01, a Medical Vocational Guideline providing a claimant may be disabled if he or she cannot

21 ¹ “A claimant is not per se disabled if he or she is illiterate.” *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001).
 22 Nevertheless, in *Pinto*, the Ninth Circuit held that an ALJ erred in noting the claimant’s inability to speak English in
 23 both his findings of fact in step four of the disability analysis and his hypothetical to the VE and failing to explain
 24 how the English-language limitation “related to his finding that [the claimant] could perform her past relevant work
 as generally performed.” *Id.* Thus, upon remand, to the extent the ALJ makes findings regarding Plaintiff’s English-
 language limitations in the RFC and in her hypothetical to a VE, the ALJ shall also explain how Plaintiff’s English-
 language limitations relates to any findings Plaintiff can perform past relevant work as generally performed, if
 necessary. *See id.*

1 perform past relevant work, is approaching retirement age, and has no more than a marginal
2 education and only unskilled or no previous work history. *See id.*, pp. 7-9; *see also* GRID
3 203.01. However, as discussed in Section I, *supra*, had the ALJ properly weighed the medical
4 evidence, the RFC and hypothetical questions posed to the vocational expert may have included
5 additional limitations. *See AR 26, 93-100.* Thus, the ALJ erred in evaluating Plaintiff's RFC and
6 consequently her Step Four findings were erroneous. On remand, the ALJ shall re-evaluate the
7 RFC and Step Four or Five findings, if necessary.

CONCLUSION

9 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded
10 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and
11 this matter is remanded for further administrative proceedings in accordance with the findings
12 contained herein.

13 || Dated this 3rd day of October, 2016.

David W. Christel
David W. Christel
United States Magistrate Judge